2002

State of Utah v. Wallace Wayne Dean : Brief of Respondent

Utah Supreme Court

IN THE UTAH SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	)	
	:	
Plaintiff/Petitioner,	)	
	:	
	)	Case No. 20020952-SC
vs.	:	
	)	Court Appellant: 20000340-CA
WALLACE WAYNE DEAN,	:	
	)	
Defendant/Respondent.	:	
	)	

* *

BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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IN THE UTAH SUPREME COURT OF THE STATE OF UTAH

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JURISDICTION AND NATURE OF THE PROCEEDINGS

The Respondent agrees that this Court granted certiorari to review the Utah Court of Appeals decision in State v. Dean, 2002, UT App 323, 57 P.3d 1106, which reversed the District Court's denial of Respondent's motion to withdraw. The Respondent further agrees that this Court has jurisdiction pursuant to Utah Code Annotated Section 78-2-2(3)(a)(Supp. 2002).

ISSUES PRESENTED ON APPEAL

Issue No. 1: Whether or not the Court of Appeals erred in exercising its discretion to address the plain error issue of entry of plea where the specific grounds

had not been set forth in Respondent's motion to withdraw plea.

Issue No. 2: Whether or not the trial court erred in failing to conduct a proper colloquy as required Rule 11, Utah Rules of Criminal Procedure, at the time of accepting the Respondent's plea of guilty.

Issue No. 3: Whether or not the trial court erred in denying Respondent's motion to withdraw his plea of guilty and by failing to establish the appropriate findings on the record.

Issue No. 4: Whether or not the Respondent was denied the right to counsel at the time of sentencing or whether he waived his right to counsel by choosing to represent himself when the trial court denied the Respondent's motion to continue.

STANDARDS OF REVIEW

The first issue involves the jurisdictional rule established in State v. Reyes, 2002, UT 13, ¶¶. 3 and 4 which requires that a defendant file a timely motion to withdraw a guilty plea and further holds that the failure to do so extinguishes a defendant's right to challenge the validity of a plea on appeal. The present case takes the argument a step further requiring that Respondent specify precisely all issues in the motion to withdraw the plea or otherwise waive the right to raise new issues on appeal. In Reyes, since the defendant failed to file a motion to withdraw, the issue of preservation was jurisdictional. In concluding, the Utah Supreme Court

held that it may choose to review an issue not properly preserved for plain error. See State v. Holgate, 2000 Ut. 74, ¶ 11, 10 P.3d 346. It cannot, however, use plain error to reach an issue over which it has no jurisdiction. In the present case, because the jurisdictional issue was satisfied by the filing of a motion to withdraw albeit non-specific, Reyes does not preclude the Court of Appeals from reviewing the Respondent's claim on the basis of discretionary review. The Respondent asserts that the Court of Appeals did not abuse its discretion in doing so. Consequently, the standard of review is believed to be an abuse of discretion standard and should not be set aside unless clearly erroneous. The standard of review for claims of plain error place a burden upon the Respondent of showing (i)[a]n error existed; (ii) the error should have been obvious to the trial Court; and (iii) the error is harmful. See State v. Hittle, 2002 UT App. 134, ¶ 5, 47 P.3d 101.

Respondent believes that the next two issues presented for review are procedural in nature and are reviewed under the abuse of discretion or clearly erroneous standard. An appellate court will review a trial court's denial of a motion to withdraw a plea under an abuse of discretion standard; the trial court's findings of fact made in conjunction with its discretion will not be set aside unless they are clearly erroneous. See State v. Thurman, 911 P.2d 371(Utah, 1996). It is an abuse of discretion to deny Respondent's motion to withdraw his plea if he did not have full

knowledge and understanding of the consequences of his plea. See State v. Valsilacopulos, 756 P.2d 92(Ut. App.), cert. denied, 765 P.2d 1278 (Utah 1988).

The trial court has the burden of ensuring strict compliance with Rule 11, Utah Rules of Criminal Procedure. State v. Visser, 2000 UT 88, ¶ 11. The ultimate question of whether the trial court strictly complied with the requirements is a question of law that is reviewed for correctness. See State v. Benvenuto, 983 P.2d 556, 558 (Utah 1999).

The fourth issue, the Respondent's right to counsel of his choosing, is one that Respondent believes involves a legal question and therefore the correctness standard applies. This is done without according any difference to the trial court's legal conclusions. See Bonham v. Morgan, 788 P.2d 497 (Utah 1989).

STATUTORY PROVISIONS

The statutory provisions which Respondent believes to be applicable are as follows:

1. The Utah State Constitution Article 1, Section 12.
2. Rule 11, Utah Rules of Criminal Procedure, 1953, as amended.
3. Utah Code Annotated §78-2-2(3)(a) (1953, as amended).
4. Utah Code Annotated §77-13-6 (1953, as amended).

STATEMENT OF THE CASE

NATURE of the CASE: This matter concerns the Respondent, WALLACE WAYNE DEAN, who on or about the 8th day of March, 2000, entered into a statement of defendant regarding plea bargain whereby he agreed to plead guilty to count I, child abuse, a second degree felony, count III, child abuse, a class A misdemeanor and count V, assault, a class B misdemeanor, as contained in the original information. It was agreed that the remaining charges be dismissed, no additional charges filed and the State recommend the preparation of a presentence investigation report. See the Record at page 35.

On or about the 18th day of February, 2000, the Respondent was taken into custody for drinking in violation of his probation. The Cedar City Police Department searched the residence and arranged to take his children into protective custody. The Respondent's wife, the mother of the children, died on or about the 8th day of January, 2000, from alcoholism and cirrhosis, failure of the liver. After interviewing the children, charges were filed against the Respondent for assault and abuse.

At the time of entering the plea of guilty, the Respondent was represented by Dale Sessions, the public defender. Thereafter, Respondent retained D. Bruce Oliver to represent him in the filing of a motion to withdraw his guilty plea which was filed on or about the 10th day of April, 2000, see the Record at page 40. Retained

counsel requested a continuance to accommodate a conflict and become familiar with the facts in the case. It is unclear what transpired thereafter, but appears the trial court declined to continue sentencing, allowed Mr. Sessions to withdraw as appointed counsel and required the Respondent to speak in his own behalf without the assistance of counsel. See the minutes of the Record at page 46; see also the Record at page 53.

The Judgment, Sentence and Commitment, states that the Respondent was present with his attorney, Dale Sessions, and that the court reviewed the file and heard statements from him, his attorney and others, being fully advised of the premises before making and entering its judgment, sentence, and commitment. The judgment does not appear to address the Respondent's outstanding motion to withdraw his guilty plea or the request for continuance. See the Record at page 57. No findings were made with regard to those issues. Notice of Appeal was filed on or about the 20th day of April, 2000. See the Record at page 64. While pending on appeal, Respondent made a motion to proceed in forma pauper, requesting the State to bare the transcript cost relevant to the appeal, and reappoint the public defender to represent him on appeal. See the Record at page 62. The case was assigned to William Leigh an Iron County Public Defender. J. Bryan Jackson was substituted as counsel for WALLACE WAYNE DEAN, filed on or about the 4th day

of October, 2001. See Addendum, Exhibit I.

COURSE OF PROCEEDINGS AND DISPOSITION: On or about the 18th day of February, 2000, the Respondent was taken into custody and his children taken into protective custody. During the investigation, the children were questioned and allegations were made alleging child abuse and assault against the Respondent. The Respondent was originally charged on six (6) counts the severity ranging from child abuse to threat against life or property, one (1) first degree felony, three (3) class A and two (2) class B misdemeanors. See the Record at page 4. No preliminary hearing was held. See minutes of the Record at page 25; see also a copy thereof at Addendum, Exhibit B.

At the time set for preliminary hearing, March 8th, 2000, the Respondent executed a statement of defendant regarding plea bargain, pleading guilty to count I, child abuse, a second degree felony, count III, child abuse, a class A misdemeanor, and count V, assault, a class B misdemeanor as contained in the original information. The remaining charges were dismissed, no additional charges filed and the State recommended the preparation of a presentence investigation report.

The trial court did not go through its usual colloquy to establish that the plea was voluntary or knowingly made and did not advise Respondent of his right to a

speedy public trial before an impartial jury or that by entering into the plea Respondent would be waiving those rights. The matter was set for sentencing on the 11th day of April, 2000. Id.

On or about the 10th day of April, 2000, the Respondent filed a motion to withdraw plea through retained counsel, D. Bruce Oliver, and requested a continuance of sentencing to accommodate a conflict in retained counsel's schedule and to allow for additional time to become familiar with case. See the Record at page 40.

On the 11th day of April, 2000, the matter came before the trial court, and Respondent was sentenced to prison pursuant to the recommendation of Adult Probation and Parole. See the minutes of the Record at page 46.

On or about the 11th day of April, 2000, the trial court filed a judgment, sentence and commitment, stating that Respondent was present and appeared in person together with his counsel of record, Dale Sessions, and that the court had reviewed the file and heard statements of the defendant, his attorney and others and having been fully advised of the premises made and entered the following Judgment, Sentence, Stay of Execution of Sentence, Order of probation and Commitment. See the Record at page 57. The Respondent was adjudged and decreed guilty of the offenses to which he plead guilty, sentenced to the term of one (1) to fifteen (15)

years in the Utah State Prison and placed in the custody of the Utah State Department of Corrections and committed to the Iron County Sheriff to deliver him to the Utah State Prison in Draper, Utah. Id.

There was no stay of execution of sentence or order of probation as part of the judgment, sentence and commitment. There were no findings regarding the Respondent's motion to withdraw plea or regarding Mr. Oliver's appearance as counsel or his request for continuance. See the Record at page 57. While pending on appeal, a motion was made to proceed in forma pauper requesting that the State bare the transcript cost and the reappointment of the public defender on appeal. See the Record at page 62. In October, 2001, J. Bryan Jackson, appeared as counsel for WALLACE WAYNE DEAN, substituting for the public defender appointee. See the Addendum, Exhibit I.

The Court of Appeals reviewed the matter and reversed on grounds of plain error that the trial court failed to strictly comply with Rule 11, Utah Rules of Criminal Procedure. The State petitioned for writ of certiorari, and the same was granted by the Utah Supreme Court on the 12th day of February, 2003.

STATEMENT OF FACTS:

1. On or about the 18th day of February, 2000, the Respondent was arrested and taken into custody for violating his probation. His children were taken into

protective custody. During investigation, it was discovered that the children complained of child abuse and charges were filed against the Respondent, originally six (6) counts ranging from child abuse to threat against life or property and ranging from a first degree felony to class B misdemeanors.

2. No preliminary hearing was held. However, at the time the matter was set for preliminary hearing, March 8, 2000, the Respondent executed a statement of defendant regarding plea bargain, pleading guilty to count I, child abuse, a second degree felony, count III, child abuse a class A misdemeanor, and count V, assault, a class B misdemeanor, as contained in the original information. See statement of defendant regarding plea bargain on page 35 of the Record; see a copy of statement at Addendum, Exhibit A.

3. The pleas of guilty were entered upon the understanding that the remaining charges would be dismissed, no additional charges filed and the State recommend the preparation of a presentence investigation report. Id.

4. The trial court did not conduct a proper colloquy to establish that the plea was voluntary and entered knowingly and did not advise Respondent of his right to a speedy public trial before an impartial jury. See hearing transcript of March 8th, 2000, at pages 1 to 7. See also a copy thereof at Addendum, Exhibit J.

5. The matter was set for sentencing on the 11th day of April, 2000.

6. On the 10th day of April, 2000, the Respondent filed a motion to withdraw plea, through retained counsel, D. Bruce Oliver, and requested a continuance of sentencing to accommodate a conflict in retained counsel's calendar and to allow for additional time to become familiar with the case. See the Record at page 40; see also a copy of motion at Addendum, Exhibit C.

7. On the 11th day of April, 2000, the matter came before the trial court and the Respondent was sentenced to prison pursuant to the recommendation of Adult Probation and Parole. The minute entry states that attorney Sessions was allowed to withdraw and the Defendant proceed pro se. See minutes in the Record at page 46; see also a copy thereof at Addendum, Exhibit D.

8. On or about the same day, the trial court filed a judgment, sentence and commitment, stating that the Respondent was present and appeared before the court in person together with his counsel of record, Dale Sessions, and stated that the court had reviewed the file and heard statements of the Respondent, his attorney and others and having been fully advised of the premises, made and entered Judgment, Sentence and Stay of Execution of Sentence, Order of Probation and Commitment. See the Record at page 57; see also a copy thereof at Addendum, Exhibit E.

9. The Respondent was adjudged and decreed guilty of the offenses to which he plead guilty, sentenced to the term of one (1) to fifteen (15) years in the Utah State Prison and placed in the custody of the Utah State Department of Corrections and committed to the Iron County Sheriff to deliver him to the Utah State Prison in Draper, Utah. Id.

10. There was no stay of execution of sentence or order of probation as part of judgment, sentence and commitment. There were no findings regarding the Respondent's motion to withdraw or continuance and no statement of denial in the judgment, sentence and commitment. Id. There was a separate order submitted and filed the same day which makes no findings and denies Respondent's motions making a general reference to the State's opposing memorandum. See the record at page 53; see also a copy thereof, Addendum, Exhibit K.

11. Notice of Appeal was filed on or about the 20th day of April, 2002. See the Record at page 64; see also a copy thereof at Addendum, Exhibit F.

12. While pending on appeal, Respondent's counsel made a motion to proceed in forma pauper, requesting the State to bare the transcript cost of appeal as well as requesting the reappointment of a public defender. See Addendum at Exhibit G. The Respondent also requested the same personally by letter. See the Record at page 62; see also a copy of Respondent's letter at Addendum, Exhibit H.

13. The case was assigned to William Leigh, an Iron County Public Defender, and J. Bryan Jackson was substituted as counsel on or about the 4th day of October, 2001, although the record does not appear to have the filed notice of substitution of counsel, a copy of which is attached to Addendum, Exhibit I.

14. The matter was addressed by the Court of Appeals on or about the 3rd of October, 2002, in State v. Dean, 2002, UT App. 323, a copy of which is attached to Addendum, Exhibit L, reversing whereupon the State petitioned for writ of certiorari and the same was granted by the Utah Supreme Court on the 12th day of February, 2003.

SUMMARY OF ARGUMENTS

A.

The Court of Appeals did not abuse its discretion in addressing the plain error issue when the jurisdictional requirement had been met in that the Respondent had filed a timely motion to withdraw his plea albeit non-specific under the circumstances of this case. The State's interpretation of the Utah Supreme Court's decision in State v. Reyes, 2002 UT 13, limiting the scope of authority or jurisdiction to only those issues specifically contained in a motion to withdraw plea defies not only the basis for establishing a jurisdictional requirement but effectively eliminates any use of the discretionary power of review on the basis of plain error or exceptional

circumstances. Moreover, such a restricted interpretation defies practical application in that counsel for a defendant intending to withdraw a plea of guilty would have to have a complete and comprehensive understanding of all circumstances in the case before entering an appearance or filing such a motion which few defense attorneys would be willing to do so and therefore defendants in similar circumstances are prejudiced in their efforts to retain legal representation for such purposes. Last, since by the State's interpretation of jurisdictional appellate authority being limited to the specific issues asserted in a motion to withdraw, the concluding language in the case is superfluous if not inconsistent when this Court states that it may choose to review an issue not properly preserved for plain error.

B.

The trial court erred in failing to conduct a complete and proper colloquy as required by to Rule 11, Utah Rules of Criminal Procedure, and particularly in failing to establish that the plea was voluntary and made knowingly or advised the Respondent of his right to a speedy public trial before an impartial jury or of the waiver of the same. The burden is on the trial court to strictly comply with requirements of Rule 11 and establish a record. In this case, the written statement is incomplete. There was no verbal colloquy by the court to speak of and no evidence in the record to indicate that counsel had advised Respondent. The type

of error, failure to advise of a speedy trial before an impartial jury is one that has previously been determined harmful and prejudicial and constitutes good cause for withdrawing a plea of guilty.

C.

The trial court erred in the denying Respondent's motion to withdraw plea and in failing to establish in the record findings for denying the plea. Respondent has a statutory right to withdraw his plea pursuant to Utah Code Annotated Section 77-13-6(1953, as amended). The motion was timely under State v. McGee, 2001 UT 69, and State v. Ostler, 2001 UT 68. No findings were made in the trial court's order and there is confusion in the record as to what actually transpired on April 11th, 2000, particularly regarding Respondent's form of legal representation and regarding the sentence imposed. There is a need to require that when denying a motion to withdraw that the trial court enter findings and establish on the record that the plea was entered knowingly and voluntarily and advise a defendant of all his procedural and constitutional rights as required under Rule 11, Utah Rules of Criminal Procedure.

D.

The trial court erred in denying Respondent' motion to continue which would have allowed him to be represented by retained counsel for sentencing. There is no

indication in the record that a short continuance would have unreasonably disrupted the orderly processes of justice. The Respondent is entitled to be represented by counsel of his choosing so long as it is not an attempt to destroy or impede the orderly processes of justice. The trial court refused to continue sentencing or allow argument on the motion to withdraw plea. There is no colloquy between the trial court and the Respondent to determine if Respondent acted knowingly, intelligently and voluntarily in waiving his right to counsel and proceeding pro se. The trial court did not the advise the Respondent of the dangers of self representation. There is nothing in the record establishing that the Respondent made his choice with eyes open as required by State v. Petty, 2000 UT App. 396 and State v. Valencia, 2001 UT App. 159.

ARGUMENTS

A.

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN ADDRESSING THE PLAIN ERROR ISSUE WHERE THE JURISDICTIONAL REQUIREMENT HAD BEEN MET IN THAT THE RESPONDENT HAD FILED A TIMELY MOTION TO WITHDRAW HIS PLEA ALBEIT NON-SPECIFIC UNDER THE CIRCUMSTANCES OF THIS CASE.

The foremost and fundamental consideration for the Utah Supreme Court considering this matter on the State's petition for writ of certiorari seems, at least to the Respondent, to have more to do with the Court of Appeals interpretation of State

v. Reyes, 2002 UT 13, and its use of discretionary power for review on the basis plain error or exceptional circumstances in cases where the issues are not strictly preserved in the proceedings of the lower court. In considering such, the Respondent is quick to note that this presents a poor factual model since there were a number of Rule 11 and other violations and not all were addressed by the Court of Appeals. Notwithstanding, the circumstance that the State seems to be most concerned with deals with the inadequacy of the Respondent's motion to withdraw his plea which did not specify its basis other than in the most general of terms, i.e., "the plea was not taken pursuant to Rule 11, Utah Rules of Criminal Procedure and Utah Code Annotated Section 77-13-6 (1953, as amended) constitutes a violation of due process and deprived the Defendant equal protection." See motion to withdraw guilty plea of Defendant at the Record at page 40; see also attached as Respondent's Exhibit C. The State of Utah responded to the motion in as general and confusing terms. The motion was never argued.

What transpired is that sentencing went forward notwithstanding the fact that counsel for Respondent could not be present and had filed a motion for a short continuance. The Respondent was given the choice of reappointing the public defender by whom he had been persuaded to enter into the plea agreement previously and given the choice of public defender or representing himself, the

Respondent chose to represent himself.

Notwithstanding, the court did not inquire into Respondent's ability to represent himself, understand the nature of proceedings and the potential consequences of the penalties involved in the proceedings nor determined if such a waiver of the right to counsel was done knowingly and voluntarily. Instead, the court went forward with sentencing and committed the Respondent to prison.

Moreover, the documentation prepared in conjunction with the proceedings are to say the least, ambiguous because they fail to properly represent what transpired and in fact give those attempting to review the record and the transcript reason to consider the whole matter confused, unsettled and wholly unpreserved on many issues including but not limited to that which the State has regarding the plain error challenge to the entry of plea.

The Utah Supreme Court's decision in Reyes seems to make at least one restriction in the Court of Appeal's discretionary powers to review the proceedings of the lower court regarding a challenge to a plea on appeal by requiring that a defendant move to withdraw his guilty plea within the jurisdictional thirty (30) day period to address the issue on appeal. Since the defendant in that case failed to file a motion to withdraw his guilty plea the Utah Supreme Court was quick and definitive in dismissing the appeal and in doing so concluded:

> This Court may choose to review an issue not properly preserved for plain error. See State v. Holgate, 2000, Utah 74 at ¶ 11, 10 P.3d 346. It cannot, however, use plain error to reach an issue over which it has no jurisdiction.

The State takes the position that the scope of authority goes beyond the mere filing of a motion to withdraw a plea, the jurisdictional requirement, but considers it a limit and restriction to the specific issues contained within the motion itself. The Respondent contends that such an interpretation is far too restrictive and runs contrary to the liberal pleading policies that are generally considered the basis for the present rules of procedure both civil and criminal. Moreover, it fails to take into account the circumstances of this case which are by no means isolated. A defendant desires to withdraw his plea and therefore arranges to retain counsel to do so. It would not be difficult to foresee that the attorney would act quickly and with brevity to meet jurisdictional requirements of timely filing anticipating that the details and substance of the motion could be dealt with at the time of argument or by supplemental memoranda. The State's position on the issue requires that any new attorney, before considering whether he assist a defendant in withdrawing a plea of guilty, would have to have a complete and comprehensive understanding of all circumstances before entering his appearance or filing such a motion. It is clear what the consequence of that would be. Very few defense attorneys would come to the aide of defendants.

The Respondent asserts that such was not the intention of the Supreme Court in its ruling in the Reyes case. The Respondent asserts that the Utah Court of Appeals was reasonable in its interpretation that the filing of a motion to withdraw the plea met the jurisdictional requirements and therefore it was a matter of their discretionary review to consider any issues regarding plain error. In the instant case, they were numerous. However, the Court of Appeals saw fit to only address the most obvious which was the trial court's failure to strictly comply with Rule 11 in that the written plea agreement did not specifically use the appropriate language of waiving his right to a speedy public trial before an impartial jury. This was a matter established by precedent as being harmful. Since the decision amounted to a reversal, the Court of Appeals declined to address the remaining issues raised by the Respondent.

The Respondent includes those issues as they were raised before the Court of Appeals to be considered in conjunction with the issues presented by the State on its petition for writ of certiorari and begs pardon to exclude them if they go beyond the scope this review. Notwithstanding, there is at least a point to be made that the Court of Appeals' decision to exercise its discretion to review the matter may have had to do in part with the fact that there were several other indiscretions in scrutinizing the proceedings of the lower court in this particular case.

The Respondent believes that this case was a matter of discretionary review and therefore the appropriate standard of the Utah Supreme Court should be one of abuse of that discretion as opposed to simply applying the principles of correctness or interpretation of law assuming of course that this Court finds the Court of Appeals' interpretation of the Reyes decision as the correct application of the law.

Finally, the Respondent asserts that the Court of Appeals correctly applied the plain error standard under the circumstances of this case where the written plea agreement was inadequate and the colloquy from the bench failed to establish the essential requirements of Rule 11 prior to the acceptance of the plea of guilty. Since a right to a speedy public trial before an impartial jury is a substantial constitutional right, the need to make a separate finding of harm is unnecessary and presumed to be harmful if the trial court fails to inform a defendant accordingly.

B.

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A COMPLETE AND PROPER COLLOQUY AS REQUIRED PURSUANT TO RULE 11, UTAH RULES OF CRIMINAL PROCEDURE, AND PARTICULARLY IN FAILING TO ESTABLISH THAT THE PLEA WAS VOLUNTARY OR THAT RESPONDENT WAS ADVISED OF HIS RIGHT TO A SPEEDY PUBLIC TRIAL BY AN IMPARTIAL JURY.

Recent Utah Supreme Court and Court of Appeals decisions have been explicit in setting forth the requirements for accepting a plea. However, the

procedure is one that has been in place for some time. Rule 11(e), Utah Rules of Criminal Procedure requires that a trial court may not accept a plea of guilty until it has found that:

> ... (3) the Defendant knows of his right to the presumption of innocence, the right against compulsory self incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross examine in open Court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, those rights are waived. (Emphasis added).

It has been well established that the trial court has the burden of ensuring strict compliance with this rule. See State v. Gibbons, 740 P.2d 1309, 1312, 1313, (1987); see also State v. Hoff, 814 P.2d 1119, 1122 (Utah 1991). In considering this requirement in State v. Visser, 2000 UT 88 at ¶ 11, the Utah Supreme Court stated:

> This means "that the trial court [must] personally establish the Defendant's guilty plea is truly knowing and voluntary and establish on the record that the Defendant knowingly waived his or her constitutional rights" (emphasis in original) (citations omitted). Still we have described the court's duty in this regard as a duty of "strict" compliance (citations omitted). Strict compliance, however, does not mandate a particular script or rote recitation of the rights listed (citations omitted). We must thus reemphasize that the substantive goal of Rule 11 is to ensure that defendants know of their right and thereby understand that basic consequence of their decision to plead guilty. That goal should not be over shadowed or undermined by formalistic ritual. Id at ¶ 11.

The ultimate question of whether the trial court strictly complied with the requirements of Rule 11 as well as constitutional and procedural requirements for entry of plea of guilty is a question of law that is reviewed for correctness. See State v. Benvenuto, 983 P.2d 556, 558 (Utah 1999) (quoting State v. Holland, 921 P.2d 430, 433 (Utah 1996). A failure to comply with the requirements of Rule 11 constitutes plain error and the Respondent has the burden of showing (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful. See State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993). Where the trial court fails to conduct a Rule 11 colloquy on the record and particularly where the trial court fails to advise a defendant of his or her constitutional right to a speedy public trial before an impartial jury is determined prejudicial and harmful. See State v. Ostler, 2000 UT App. 28; see also State v. Tarnawiecki, 2000 UT App. 186.

In the instance case, the Respondent, while represented by the public defender's office, entered into a statement regarding plea bargain, filed March 8th, 2000, see the Record at page 35; see also attached Respondent's Addendum, Exhibit A. The statement makes no mention of Respondent's right to a speedy public trial by an impartial jury or the effect of his waiving such right by entering into a plea bargain.

The transcript for the hearing on March 8th, 2000, identifies the hearing as a preliminary hearing. However, no preliminary hearing was conducted. Rather, the plea was entered pursuant to the statement of the defendant regarding plea bargain and while guilty pleas were entered to counts I, III and V and some explanation offered by counsel as to certain commentary added to the written instrument, the trial court asked no questions regarding Respondent's competency, the voluntariness of the plea, or his understanding of the circumstances that by him executing the statement and entering into the plea bargain he waived certain procedural and constitutional rights. See hearing transcript of March 8th, 2000, pages 1 through 7; see also a copy thereof at Addendum, Exhibit J. Moreover, the trial court did not advise the Respondent as to his right to a speedy public trial before an impartial jury and further failed to advise the Respondent that by entering into such statement he would be waiving his right to a speedy public trial before an impartial jury and since the area is one not covered in the written statement and it being further unestablished as to whether or not counsel had advised the Respondent of such right and waiver, the Respondent asserts that the same constitutes plain error and therefore the Court of Appeals acted appropriately in considering the matter at its discretion. The Respondent further asserts that the trial court's failure to strictly comply with Rule 11 constitutes good cause for the withdrawal of his plea. See

State v. Smith, 812 P.2d 470 (Ut App. 1991).

C.

THE TRIAL COURT ERRED IN THE DENYING RESPONDENT'S MOTION TO WITHDRAW PLEA AND IN FAILING TO ESTABLISH ON THE RECORD FINDINGS FOR DENYING THE PLEA.

The Respondent has a statutory right to withdraw his plea as established by the terms and restrictions set forth in Utah Code Annotated Section 77-13-6 (1953, as amended). A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court. A request to withdraw a plea of guilty shall be made within thirty (30) days after the entry of the plea. In the instant case, the plea was entered on March 8th, 2000. Respondent's motion to withdraw the plea was filed on April 10th, 2000, the day the Respondent retained private counsel for that purpose.[1] Notwithstanding the issue as to the timeliness of the motion, the circumstances of this particular matter are peculiar in that from the Court's minutes in the record on April 11th, 2000, it indicates that the court denied the Respondent's

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[1] Counsel for Respondent concedes that since March has thirty-one (31) days, the calculation of time as computed by the Respondent or his former counsel may not have been accurate as it appears to this attorney that Friday, April 7th, 2000, was the thirtieth and final day to file the motion to withdraw plea. However, in State v. McGee, 2001 UT 69, the Utah Supreme Court made clear that in computing the statutory thirty (30) day period regarding a motion to withdraw a plea, the same begins to run at the time the trial court enters a final judgment of conviction based on the plea. See paragraph 8. This was also the position taken in State v. Ostler, 2001 UT 68 which purports to have overruled the holding in State v. Price, that the statutory thirty (30) day limit runs from the colloquy.

motion through retained counsel, D. Bruce Oliver, with an indication that the judge stated his grounds for denying the motion which are not reflected in the minutes and further not found in the resulting document of that day's hearing, the Judgment, Sentence and Commitment. See the minutes of April 11th, 2000, at the Record, page 47; see also a copy thereof at Addendum, Exhibit D. In fact, the Judgment, Sentence and Commitment represents that the Respondent appeared before the court in person with his attorney of record, Dale Sessions, Respondent's previously appointed counsel, and further states that the court having been fully advised makes and enters a judgment, sentence, stay of execution of sentence, order of probation and commitment wherein the minutes clearly show that there was no stay of execution of sentence or order of probation made by the Court and that Dale Sessions was released by the Court as counsel for the Respondent prior to sentencing. See the minutes in the Record at page 47; see also a copy thereof at Addendum, Exhibit D. Compare the Record page 57; see also a copy fo the Judgment, Sentence and Commitment at Addendum, Exhibit E.

Also filed on April 11th, 2000, was an order on the motion to withdraw guilty plea which simply states that the trial court having considered the motion to withdraw guilty plea, denies said motion on the grounds set forth in State's response. See the Record at page 53; see also a copy thereof at Addendum, Exhibit K.

The Court of Appeals has previously ruled that it is an abuse of discretion to refuse to allow a defendant to withdraw a plea of guilty which was not made in strict compliance with Rule 11. See State v. Trujillo-Martinez, 814 P.2d 596 (Ut. App. 1991). That has also been the ruling of the Utah Supreme Court. See State v. Gibbons, 740 P.2d 1309, 1312-14 (Utah 1987). While the cases do not address the issue directly there is a strong inference from them that the trial court must establish findings or at least articulate its basis for denying a motion to withdraw a plea. Respondent contends that when the basis of the motion concerns the trial court's failure to strictly comply with Rule 11, the burden is upon the trial court to establish that the defendant's guilty plea was truly knowing and voluntary and establish on the record that he knowingly waived his or her constitutional rights.

In other words, there must be evidence in the record or from the circumstances of the case indicating that a defendant was advised of his right to a speedy public trial by an impartial jury as well as all other procedural and constitutional rights and that the same were waived knowingly and voluntarily. In the instant case, there is no evidence in the record establishing these factors and the circumstances of the case do no support even the speculation that the Respondent was advised accordingly. It is clear that the trial court did not personally establish through colloquy, either written or verbal that the requirements of Rule 11 had been

met. Moreover, the order signed and filed by the court makes no findings and fails to give any explanation of the ruling except to refer to the memorandum of the State in general. Consequently, one can only draw a conclusion as to the basis for the Respondent's motion by speculating as to the Court's intention in referring generally to the State's opposing memorandum. Hence, the confusion and misunderstanding can in large part be attributed to this lack of clarity and simplicity. It could have all been avoided had the trial court interrogated the Respondent with the routinely asked questions of oral colloquy at the time of accepting the plea.

D.

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION TO CONTINUE ALLOWING HIM TO BE REPRESENTED BY HIS RETAINED COUNSEL AT THE TIME OF SENTENCING WHERE A SHORT CONTINUANCE WOULD NOT HAVE UNREASONABLY DISRUPTED THE ORDERLY PROCESSES OF JUSTICE UNDER THE CIRCUMSTANCES.

The circumstances of this present case are a bit unusual in that the trial court's denial of Respondent's motion to withdraw plea and to continue and proceed with sentencing effectively denied him his right to be represented by the attorney of his choosing, D. Bruce Oliver, and forced him to decide upon representation by appointed counsel, Dale Sessions, the Iron County Public Defender or to represent himself. The Respondent decided to represent himself although it specifies in the Judgment, Sentence, and Commitment that the Respondent was represented by

Dale Sessions. The trial court sets forth no findings and the record discloses no reason as to why Respondent's motion to continue was denied. The circumstances give rise to an issue of first impression regarding to scope of the Respondent's right to counsel. In Webster v. Jones, 587 P.2d 528 (Utah 1978), in the context of addressing a related issue, the Utah Supreme Court stated:

> We are in accord in the contention of the Plaintiff that where a person is charged with an offense which may be punished by imprisonment, he is entitled to the assistance of counsel. ... this assures an accused the right to representation by an attorney of his choice if he is able to employ counsel, or if he is indigent and unable to obtain counsel, he is entitled to a court appointed attorney. Id at 530, citing to Glenn v. United States, 303 F.2d 536 (5th Cir. 1962). (Emphasis added).

In State v. Wulffenstein, 733 P.2d 120, appeal dismissed, certiorari denied 108 S. CT. 47, 484 U.S. 803, 98 L.Ed. 2d 12, the Utah Supreme Court further refined the right to counsel with regard to appointed counsel first stating that an accused is entitled to employ counsel of his choice and then stating that he does not have an immutable right under the Sixth Amendment of the United States Constitution or under our State Constitution to reject appointed counsel for the purpose of forcing the Court to appoint private counsel of his choice to represent him, absent a showing of good cause for such a change. Id at 121. The Court went on to state that the accused is entitled to the effective assistance of a competent member of the State bar who is willing to identify the interests of the defendant and present the available

defenses. Id. Further, the Court held that the right to counsel does not include the right of the defendant to designate his own court appointed counsel by either process of affirmative demand or the selective elimination of other attorneys. Id at 121-122.

Much of the judicial analysis in Utah has been directed toward the development of the right to counsel in the context of effective assistance of appointed counsel and in establishing a basis for determining whether one's ineffective assistance rises to the level of denying a defendant his or her right to counsel, e.g. State v. Johnson, 823 P.2d 484 ¶ (Ut. App. 1991) (the right to effective assistance of counsel requires courts to balance a defendant's constitutional right to retain counsel with a need to maintain the highest standards of professional responsibility, the public's confidence in the integrity of the judicial process and the orderly administration of justice); see also St. George v. Smith, 828 P.2d 504 (Ut. App. 1992) (the right to counsel does not entail a right to appointed counsel of one's choosing or to be represented by a lay person or unlicensed attorney).

Recently, the Utah Court of Appeals in State v. Petty, 2001 UT App. 396, considered the issue of right to counsel in the context of waiver under circumstances similar to the present case but with one clear distinction. In Petty, the defendant was appointed counsel and chose to represent himself. The trial court engaged in a brief colloquy and allowed the defendant to proceed pro se. Id at ¶ 3. The defendant

later argued that his waiver of counsel was not knowingly and intelligently made. The Court of Appeals addressed the matter from the standpoint of waiver. The standard of review was determined to be a mixed question of fact and law to be reviewed for correctness but with "a reasonable measure of discretion" given to the trial court's application of the facts to the law. Id at ¶ 4; see also State v. Valencia, 2001 UT App. 159 at ¶ 11.

In its analysis, the Court of Appeals stated as follows:

> In making this determination [whether or not defendant's right to waive representation and proceed pro se is made knowingly, intelligently and voluntarily] we require a trial court to conduct a colloquy on the record (citations omitted) and advise the defendant of the dangers and disadvantages of self representation "so that the record will establish that the [defendant] knows what he is doing and his choice is made eyes open." Id at ¶ 6; see also State v. Heaton, 958 P.2d 918, 917 (Utah 1998).

Other jurisdictions have addressed the right to counsel in a slightly different fashion. In State v. Zaha, 605 P.2d 306 (Or App. 1980), the Oregon Court of Appeals found as follows:

> The right to counsel carries with it a right to counsel of one's choice. The corollary right of choice, however, is subject to judicial discretion if accommodation of the right to counsel would result in a "destruction of the orderly processes of justice unreasonably under the circumstances of a particular case." Id at page 307.

Where a defendant's motion for continuance and the removal of a court appointed attorney was not an attempt to destroy or impede the "orderly processes

of justice" the Oregon court held that the trial court's failure to allow a continuance to allow the defendant to proceed with counsel of his choice was in error and was reversed and remanded for new trial.

In the present case, the Respondent was more or less forced into the position to represent himself in that he refused to be represented by appointed counsel and was requesting that the trial court continue the matter to allow him to be represented by counsel of his choice. There is nothing suggested from the record or from the minutes of the hearing that would indicate that a short continuance would in any way destroy or impede the orderly processes of justice.

Moreover, the trial court did not conduct the colloquy as required and therefore the record fails to show that the Respondent was advised of the dangers and disadvantages of self representation and fails to establish that he knew what he was doing or that his choice was made with eyes open. The trial court did not inform the Respondent of his constitutional right to counsel and his right to represent himself. The trial court did not determine that the Respondent had the intelligence and capacity to understand and appreciate the consequence of his decision to represent himself and did not make certain that the Respondent comprehended the nature of the charges and proceedings, the range of permissible punishments and any additional facts essential to a broad understanding of the case.

Moreover, the trial court did not establish through colloquy whether Respondent's waiver of the assistance of counsel was knowingly made.

Consequently, under the circumstances of the present case, the Respondent asserts that the trial court erred in denying him the right to be represented by counsel of his choice and requiring him to proceed with sentencing pro se.

CONCLUSION

On the grounds and for the reasons set forth above, Respondent, WALLACE WAYNE DEAN, prays that relief be granted in affirming the Court of Appeals decision to reverse that of the trial court and remanding to allow the Respondent to withdraw his plea with such other and further relief as to this Court appears equitable and proper.

DATED this 12 day of January, 2007.

J. BRYAN JACKSON,
Attorney for Respondent Dean

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of July, 20 03, I did mailed a true and correct photocopy of the BRIEF OF RESPONDENT DEAN, by way of U.S. mail, postage fully prepaid, thereon, to the following:

SCOTT GARRETT
DAVID E. DOXEY
IRON COUNTY ATTORNEY
97 North Main Street, Suite 1
Post Office Box 428
Cedar City, Utah 84721-0428

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
JEANNE B. INOUYE
ASSISTANT ATTORNEY GENERAL
Heber Wells Building
160 East 300 South, 6th Floor
Post Office Box 140854
Salt Lake City, Utah 84114-0854

UTAH SUPREME COURT
450 South State Street
Post Office Box 140210
Salt Lake City, Utah 84114-0210

Laura Lee

LAURA LEE,
Legal Assistant

ADDENDUM

EXHIBIT "A"

Statement of the Defendant Regarding Plea Bargain, Certificate of Counsel, and Order.

DAVID E. DOXEY (#7506)
Deputy Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 586-6694
Facsimile: (435) 586-2737

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WALLACE WAYNE DEAN Defendant	**STATEMENT OF THE DEFENDANT REGARDING PLEA BARGAIN, CERTIFICATE OF COUNSEL, and ORDER** Criminal No. 001500153 Judge ROBERT T. BRAITHWAITE

STATEMENT OF DEFENDANT REGARDING PLEA BARGAIN

I, WALLACE WAYNE DEAN, the above-named Defendant, under oath, hereby acknowledge that I have entered a plea of "guilty" to the offense(s) of Child Abuse (Count I), a Second-Degree Felony, Child Abuse (Count III), Class A Misdemeanor, and Assault (Count V) a Class B Misdemeanor as contained in the original Information on file against me in the above-entitled Court, a copy of which I have received and read, and I understand the nature of the elements of the offense for which I am pleading "guilty." I further understand the charge to which this plea of "guilty" is entered is a Second-Degree Felony, a Class A Misdemeanor, and a Class B Misdemeanor and that I am entering such a plea voluntarily and of my own free will, after conferring with my Attorney, Dale Sessions, and with a knowledge and understanding of the following facts:

W.W.D. I know that I have constitutional rights under the Constitutions of Utah and the United

States to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of guilty, or to a trial by the Court should I elect to waive a trial by jury. I know I have a right to be represented by counsel and that I am in fact represented by Dale Sessions as my attorney.

W.W.S. I know that if I wish to have a trial in Court upon the charge, I have a right to confront the witnesses against me by having them testify in open court in my presence and before the Court and jury with the right to have those witnesses cross-examined by my attorney. I also know that I have the right to have witnesses subpoenaed by the State at its expense to testify in Court on my behalf and that I could, if I elected to do so, testify in Court on my own behalf, and that if I choose not to do so, the jury can and will be told that this may not be held against me if I choose to have the jury so instructed.

W.W.S. I know that if I were to have a trial that the State must prove each and every element of the crime charged to the satisfaction of the Court or jury beyond a reasonable doubt; that I would have no obligation to offer any evidence myself; and that any verdict rendered by a jury, whether it be that of guilty or not guilty, must be by a unanimous agreement of all jurors.

W.W.S. I know that under the Constitutions of Utah and of the United States that I have a right against self-incrimination or a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify in Court upon trial unless I choose to do so.

W.W.S. 5. I know that under the Constitution of Utah that if I were tried and convicted by a jury or by the Court that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me, and to have the assistance of

counsel on such appeal.

WWH 6. I know that if I wish to contest the charge against me, I need only plead "not guilty" and the matter will be set for trial, at which time the State of Utah will have the burden of proving each element of the charge beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous. I know and understand that by entering a plea of "guilty," I am waiving my constitutional rights as set out in the preceding paragraphs and that I am, in fact, fully incriminating myself by admitting I am guilty of the crime to which my plea of "guilty" is entered.

WWH 7. I know that under the laws of Utah the possible maximum sentence that can and may be imposed upon my plea of "guilty" to the charge identified on page one of this Statement, and as set out in the Amended Information, is as follows:

Count I: Child Abuse

(A) a term of 1-15 years in the Utah State Prison

(B) And/or fined in any amount not in excess of $10,000 dollars.

Count III: Child Abuse

(A) a term of 1 year in the Iron County Jail.

(B) And/or fined in any amount not in excess of $2500 dollars.

Count V: Assault

(A) a term of six months in the Iron County Jail

(B) And/or fined in any amount not in excess of $1,000

I further understand that the imprisonment may be for consecutive periods if my plea is to more than one charge. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have pleaded "guilty," my plea in the

present action may result in consecutive sentences being imposed on me. I also know that I may be ordered by the Court to make restitution to any victim or victims of my crime.

W.W.I 8. I know that the fact that I have entered a plea of "guilty" does not mean that the Court will not impose either a fine or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be if I plead "guilty" or that it will be made lighter because of my "guilty" plea.

W.W.I 9. No threats, coercion, or unlawful influence of any kind have been made to induce me to plead "guilty," and no promises, except those contained herein, have been made to me. I know that any opinions made to me, by my attorney or other persons, as to what he or they believe the Court may do with respect to sentencing are not binding on the Court.

W.W.I 10. I know that under the laws of Utah should I desire to move the Court to set aside my "guilty" plea entered in this case, I must do so within thirty (30) days of the entry of the pleas or my right to do so will be lost. I further understand that a plea of "guilty" may be withdrawn only upon a showing of good cause and with permission of the Court.

W.W.I 11. No promises of any kind have been made to induce me to plead "guilty" except that I have been told that if I do plead "guilty," the State of Utah, has agreed to file an Amended Information therein charging me with Child Abuse, a Second-Degree Felony, Child Abuse a Class A Misdemeanor, and Assault a Class B Misdemeanor as opposed to the original charge(s) of Child Abuse, a second-degree felony, Child Abuse, a class A misdemeanor, Child Abuse, a class A misdemeanor, Commission of Domestic Violence in the Presence of a Child, a class A Misdemeanor, Assault a class B Misdemenaor and Threat Against Life or Property, a Class B Misdemeanor. I also understand that if I plead guilty as set forth above, the State agrees to not file

additional charges for allegedly threatening my children if they testified against me. I am also aware that the State will recommend the preparation of a Presentence Investigation Report. No other promises have been made. I am also aware that any charge or sentencing concessions or recommendations for probation or suspended sentences, including a reduction of the charges for sentencing made or sought by either defense counsel or the prosecutor are not binding on the Court and may not be approved or followed by the Court.

12. I have read this Statement or I have had it read to me by my attorney, and I understand its provisions. I know that I am free to change or delete anything contained in this Statement. I do not wish to make any changes because all of the statements are correct.

W.W.D. 13. I am satisfied with the advice and assistance of my attorney.

W.W.D. I am 38 years of age, I have attended school through the 11 grade, and I can read and understand the English language. I was not under the influence of any drugs, medication, or intoxicants when the decision to enter the plea was made. I am not presently under the influence of any drugs, medication, or intoxicants.

W.W.D. 15. I believe myself to be of sound and discerning mind, mentally capable of understanding the proceedings and the consequences of my plea and free of any mental disease, defect or impairment that would prevent me from knowingly, intelligently, and voluntarily entering my plea.

W.W.D. 16. I have discussed the contents of this Statement with my Attorney, and ask the Court to accept my plea of "guilty" to the charges set forth in this Statement because during 1999 I did, while in an intoxicated state, intentionally and knowingly burn my daughter with a knife that had been heated up on the stove, and during on or about January 7, 2000, I did grab my son by the neck

~~The underline is not True. My Daughter Heated up the Knife and asked me to do it because she had Blood Poison~~

and choked him to prevent him from giving Ibuprofen to my deceased wife, and that on that same date, I did unlawfully hit my wife. These acts occurred in Iron County, State of Utah.

DATED 8 day of March, 2000

WALLACE WAYNE DEAN
Defendant

CERTIFICATE OF DEFENSE ATTORNEY

I certify that I am the attorney for WALLACE WAYNE DEAN, the Defendant named above, and I know she has read the Statement, or that I have read it to him; and I discussed it with him and believe he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief after an appropriate investigation, the elements of the crime and the factual synopsis of the Defendant's criminal conduct are correctly stated, and these, along with the other representations and declarations made by the Defendant in the foregoing Statement, are accurate and true.

Dale Sessions
Attorney for Defendant

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in its case against WALLACE WAYNE DEAN, Defendant. I have reviewed the Statement of the Defendant and find that the declarations, including the elements of the offense and the factual synopsis of the Defendant's criminal conduct which constitutes the offense are true and correct. No improper inducements, threats, or coercions

to encourage a plea have been offered to the Defendant. The plea negotiations are fully contained in this Statement or as supplemented on the record before the Court. There is reasonable cause to believe the evidence would support the conviction of the Defendant for the offense for which the plea is entered and acceptance of the plea would serve the public interest.

DAVID E. DOXEY
Deputy Iron County Attorney

ORDER

Based upon the facts set forth in the foregoing Statement of Defendant Regarding Plea Bargain and the foregoing Certificates of Counsel, the Court finds the Defendant's plea of "guilty" is freely and voluntarily made, and it is so ordered that Defendant WALLACE WAYNE DEAN's plea of "guilty" to the charges set forth in the foregoing Statement be accepted and entered.

The foregoing Statement of Defendant was signed before me this 8 day of March, 2000.

ROBERT T. BRAITHWAITE
District Court Judge

EXHIBIT "B"

Minutes, Preliminary Hearing Notice.
March 8, 2000

FIFTH DISTRICT COURT- CEDAR COURT
IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES PRELIMINARY HEARING NOTICE
vs.	:	Case No: 001500153 FS
WALLACE WAYNE DEAN, Defendant.	:	Judge: ROBERT T. BRAITHWAITE Date: March 8, 2000

PRESENT
Clerk: kimp
Prosecutor: DAVID E. DOXEY
DALE W SESSIONS
Defendant

DEFENDANT INFORMATION
Date of birth: November 17, 1961
Video
Tape Number: 030800 Tape Count: 9:51 a.m.

CHARGES

1. CHILD ABUSE/NEGLECT - 2nd Degree Felony
   Plea: Guilty - Disposition: 03/08/2000 Guilty Plea
3. CHILD ABUSE/NEGLECT - Class A Misdemeanor
   Plea: Guilty - Disposition: 03/08/2000 Guilty Plea
5. SIMPLE ASSAULT - Class B Misdemeanor
   Plea: Guilty - Disposition: 03/08/2000 Guilty Plea
6. THREAT AGAINST LIFE/PROPERTY - Class B Misdemeanor
   - Disposition: 03/08/2000 Declined Prosecution

HEARING

Mr. Doxey indicates a plea agreement has been reached with the defendant. Mr. Doxey outlines the agreement. The defendant agrees to plea guilty to counts 1,3,5 and the states agrees to dismiss counts 2 and 4.

The defendant waivs his preliminary hearing and is ordered bound over for arraignment. The defendant pleads guilty to counts 1,3,5. A PSI is ordered and sentencing is set for 4-11-00 at 1:30 p.m.

Case No: 001500153
Date: Mar 08, 2000

Mr. Sessions addresses issues of bail The defendant requests bail be reduced to $5000 cash or bond. The request is denied. The defendant is ordered committed until sentencing.

SENTENCING is scheduled.
Date: 04/11/2000
Time: 01:32 p.m.
Location: Room 1
DISTRICT COURT BUILDING
40 NORTH 100 EAST
CEDAR CITY, UT 84720
Before Judge: ROBERT T. BRAITHWAITE

EXHIBIT "C"

Motion to Withdraw Guilty Plea.

D. Bruce Oliver #5120
Attorney for Defendant
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1490
Telephone: (801) 328-8888
Fax: (801) 595-0300

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH

-------oooOooo-------

STATE OF UTAH, Plaintiff, vs. WALLACE DEAN, Defendant.	**MOTION TO WITHDRAW GUILTY PLEA** Case No. 001500153 Judge Robert T. Braithwaite

Comes now the defendant, Wallace Dean, by and through counsel, D. Bruce Oliver, and hereby moves this Court for a withdrawal of his Guilty Plea as the defendant was not aware of his rights at the time of the entry of his plea, nor did he realize the ramifications of the entry of his guilty plea. Based upon information and belief, Defendant's counsel believes that the plea was not taken pursuant to Rule 11, *Utah Rules of Criminal Procedure* and *Utah Code Ann.* § 77-13-6 (1953, as amended) constitutes a violation of due process and deprived the defendant equal protection.

Said motion is filed pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 7, 12, 11, 24, and 27 of the Utah State

Constitution, and Rule 11, *Utah Rules of Criminal Procedure.*

Further, the accompanying memorandum of points and authorities is in support of said motion and is incorporated herein and annexed hereto by this reference.

RESPECTFULLY SUBMITTED this 10th day of April, 2000.

D. BRUCE OLIVER
Attorney for Defendant

CERTIFICATE OF FAXING/MAILING

I hereby certify that I caused to be transmitted a telefacsimile to (435) 586-2737 and I mailed a true and correct copy of the foregoing **MOTION TO WITHDRAW GUILTY PLEA**, via U.S. Mail, postage prepaid, to: Scott M. Burns, IRON COUNTY ATTORNEY'S OFFICE, 97 North Main, Suite #1, P.O. Box 428, Cedar City, Utah 84720.

Dated this 8th day of July, 1998.

EXHIBIT "D"

Minutes, Sentencing, Judgment, Commitment.
April 11, 2000

FIFTH DISTRICT COURT- CEDAR COURT
IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCING SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 001500153 FS
WALLACE WAYNE DEAN, Defendant.	:	Judge: ROBERT T. BRAITHWAITE Date: April 11, 2000

PRESENT
Clerk: tammyc
Prosecutor: DAVID E. DOXEY
Defendant
Defendant's Attorney(s): DALE SESSIONS
Agency: Fifth District Court

DEFENDANT INFORMATION
Date of birth: November 17, 1961
Video
Tape Number: 041100 Tape Count: 1:33 p.m.

CHARGES

1. CHILD ABUSE/NEGLECT - 2nd Degree Felony
   Plea: Guilty - Disposition: 03/08/2000 Guilty Plea
3. CHILD ABUSE/NEGLECT - Class A Misdemeanor
   Plea: Guilty - Disposition: 03/08/2000 Guilty Plea
5. SIMPLE ASSAULT - Class B Misdemeanor
   Plea: Guilty - Disposition: 03/08/2000 Guilty Plea
6. THREAT AGAINST LIFE/PROPERTY - Class B Misdemeanor
   - Disposition: 03/08/2000 Declined Prosecution

Case No: 001500153
Date: Apr 11, 2000

HEARING

TAPE: 041100 COUNT: 1:33 p.m.
On record. The Defendant is incarcerated. Mr. Sessions states he received paperwork from Bruce Oliver's office. The court denies Mr. Oliver's motion.
COUNT: 2:09 p
Mr. Sessions states he has met with the Defendant, but the Defendant would like to represent himself in these matters.
Mr. Sessions is released by the court as counsel for the Defendant; however, he is asked to help the Defendant in case the Defendant needs counsel for these proceedings.
COUNT: 2:10 p
Mr. Doxey responds to the paperwork he received from Bruce Oliver. Mr. Sessions asks the court questions regarding his representing the Defendant. Judge Braithwaite states his grounds for denying Mr. Oliver's motion.
The court states the PSI refers to this case, as well as an older one Case #961500370. Judge Braithwaite asks the Defendant if he is ready to go forward on the allegations in Case #961500370, or if he would like to have Bruce Oliver here.
The Defendant would like Bruce Oliver here to help him on the Order to Show Cause proceedings on Case #961500370 Judge Braithwaite states that the 96' case can be continued, as it is not yet ready, but that this case will go forward today.
COUNT: 2:21 p
The Defendant responds to the PSI and the agencies recommendations.
COUNT: 2:30 p
Mr. Sessions makes comments regarding sentencing.
COUNT: 2:38 p
Mr. Doxey responds to the PSI and gives sentencing recommendations.
COUNT: 2:42 p
The court sentences the Defendant to 1-15 years in the Utah State Prison. The Defendant's other case #961500370 is re-noticed for 5-2-00 at 2:30 p.m.

Case No: 001500153
Date: Apr 11, 2000

SENTENCE PRISON

Based on the defendant's conviction of CHILD ABUSE/NEGLECT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

To the IRON County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

00045

EXHIBIT “E”

Judgment, Sentence, and Commitment.

DAVID E. DOXEY (#7506)
Deputy Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 586-6694
Telecopier: (435) 586-2737

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WALLACE DEAN, Defendant.	**JUDGMENT, SENTENCE, and COMMITMENT** Criminal No.001500153 Judge Robert T. Braithwaite

The Defendant, WALLACE DEAN, having entered a plea of guilty to the offense of Child Abuse, a Second-Degree Felony, Child Abuse, a Class A Misdemeanor, and Assault, a Class B Misdemeanor on March 8, 2000, and the Court having accepted said plea of guilty and the above-entitled matter having been called on for sentencing on April 11, 2000, in Cedar City, Utah, and the above-named Defendant, WALLACE DEAN, having appeared before the Court in person together with his attorney of record, Dale Sessions , and the State of Utah having appeared by and through Deputy Iron County Attorney David E. Doxey, and the Court having reviewed the stipulated sentencing recommendation and having further reviewed the file in detail and thereafter having heard statements from the Defendant, his attorney, and the Deputy Iron County Attorney, and the Court being fully advised in the premises now makes and enters the following Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, WALLACE DEAN, has been convicted upon his plea of guilty to the offense of Child Abuse, a Second-Degree Felony, Child Abuse a Class A Misdemeanor, and Assault, a Class B Misdemeanor, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, WALLACE DEAN, and pursuant to his conviction of Child Abuse, a Second-Degree Felony, Child Abuse a Class A Misdemeanor, and Assault, a Class B Misdemeanor is hereby sentenced to a term of one to fifteen (1-15) years in the Utah State Prison, and the Defendant is hereby placed in the custody of the Utah State Department of Corrections.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, WALLACE DEAN, and deliver him to the Utah State Prison in Draper, Utah, there to be kept and confined in accordance with the above and foregoing Judgment, Sentence, and Commitment.

DATED this 17 day of April, 2000.

BY THE COURT:

Robert T. Braithwaite
District Court Judge

CERTIFICATE

STATE OF UTAH)
:ss.
COUNTY OF IRON)

I, CAROLYN BULLOCH, Clerk of the Fifth Judicial District Court in and for Iron County, State of Utah, hereby certify that the foregoing is a full, true and exact copy of the original Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment in the case entitled State of Utah vs WALLACE DEAN, Criminal No.001500153, now on file and of record in my office.

WITNESS my hand and the seal of said office in Cedar City, County of Iron, State of Utah, this 17 day of April 2000.

CAROLYN BULLOCH

(SEAL)

CAROLYN BULLOCH
District Court Clerk

By: _____
Deputy District Court Clerk

EXHIBIT “F”

Notice of Appeal.

FLOYD W HOLM (1522)
Attorney for Defendant
141 North Main, Suite 220
Cedar City, Utah 84721
Telephone: (435) 865-5800

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH,	)	
	)	NOTICE OF APPEAL
Plaintiff/Appellant,	)	
	)	
v.	)	
	)	
WALLACE WAYNE DEAN,	)	
	)	Case No. 001500153
Defendant/Appellant.	)	Judge Robert T. Braithwaite

COMES NOW Floyd W Holm, counsel for the above-named Defendant and gives notice of appeal to the Utah Court of Appeals from the Judgement, Sentence and Commitment dated April 17, 2000, following the Defendant's conviction by guilty plea to the offenses of Child Abuse, a Second-Degree Felony, Child Abuse, a Class A Misdemeanor, and Assault, a Class B Misdemeanor.

DATED THIS 26th day of April, 2000.

FLOYD W HOLM
Attorney for Defendant/Appellant

EXHIBIT “G”

Motion to Proceed in Forma Pauper.

D. Bruce Oliver #5120
Attorney for Defendant
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1490
Telephone: (801) 328-8888
Fax: (801) 595-0300

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WALLACE DEAN, Defendant.	MOTION TO PROCEED IN FORMA PAUPER Case No. 001500153 Judge Robert T. Braithwaite

Comes now the defendant, Wallace Dean, by and through counsel, D. Bruce Oliver, and hereby moves for the State to bear the transcript costs relevant to this matter on appeal. Furthermore, defendant hereby requests the reappointment of Floyd W. Holm as public defender appointee in this matter regarding the appeal.

ARGUMENT

Utah Code Ann. § 77-32-5 (1953, as amended), mandates:

> The expenses of printing or typewriting briefs on first appeals of right on behalf of an indigent defendant, as well as depositions and other transcripts shall be paid by the state, county, or municipal agency that prosecuted the defendant at trial.

Id. This is Mr. Dean's first appeal of right and as such due to his incarceration he is

indigent and therefore, the state or county should bear the costs of any transcripts.

The Utah State Constitution Article I, section 12 provides in pertinent part the rights of the accused, as follows:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense. (emphasis added)

Utah Const. art. I, § 12. Furthermore, pursuant to Utah Code Ann. § 21-7-3 an impecunious defendant in a criminal case may attest to his indigent status and thereby avail himself of his appellate rights. This indigent claim must be made in the District Court. *See, State v. Johnson*, 700 P.2d 1125 (Utah 1985).

CONCLUSION

Based upon the foregoing, the defendant hereby requests the State bear the costs of the transcripts on appeal and that the defendant be reappointed the public defender, Floyd W. Holm.

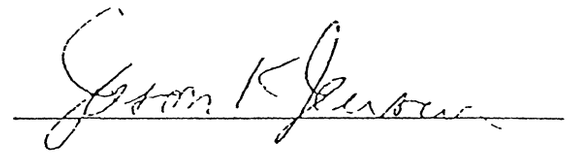
RESPECTFULLY SUBMITTED this 18th day of May, 2001.

D. BRUCE OLIVER
Attorney for Defendant

CERTIFICATE OF FAXING/MAILING

I hereby certify that I caused to be transmitted a telefacsimile to (435) 586-2737 and I mailed a true and correct copy of the foregoing **MOTION TO PROCEED IN FORMA PAUPER**, via U.S. Mail, postage prepaid, to Scott M Burns, IRON COUNTY ATTORNEY'S OFFICE, 97 North Main, Suite #1, P.O. Box 428, Cedar City, Utah 84720.

Dated this 18th day of May, 2001



D. Bruce Oliver #5120
Attorney for Defendant and Appellant
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1490
Telephone: (801) 328-8888
Fax: (801) 595-0300

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee, vs. WALLACE DEAN, Defendant and Appellant.	**MOTION TO REMAND FOR INDIGENCY DETERMINATION** Case No. 20000540 Priority No. 2

Comes now the defendant, Wallace Dean, by and through counsel, D. Bruce Oliver, and hereby moves this Honorable Court to remand this matter to the District Court of Iron County, State of Utah. The appellant has filed a Motion in the District Court to proceed in forma pauper. (See addendum A).

The appellant while incarcerated in the Utah State Prison is unable to bear the expense for his appeal. The record shows that prior to taking this matter on appeal through D. Bruce Oliver, the trial court appointed Floyd W. Holm to represent the defendant. Inasmuch, it appears appropriate that Mr. Holm should be reappointed as counsel for the defendant and the State should bear the transcript costs relevant to this matter on appeal. *See, State v. Johnson*, 700 P.2d 1125 (Utah 1985).

CONCLUSION

Based upon the foregoing, the Appellant hereby requests this matter be remanded to the District Court for the purpose of indigency determination.

RESPECTFULLY SUBMITTED this 21st day of May, 2001.

D. BRUCE OLIVER
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing **MOTION TO REMAND FOR INDIGENCY DETERMINATION**, via U.S. Mail, postage prepaid, to:

Christine F. Soltis
Office of Attorney General
Criminal Appeals Division
Heber Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Dated this 21st day of May, 2001.

EXHIBIT “H”

Letter from Wallace Wayne Dean to the Court of Appeals.

pas"

To Whom IT May Concern

My name is Wallace Wayne Dean, I am writing you this letter to Appeal my charges in which the case number is #001500153, IT was stated in court by Judge Braithwaite, I have 30 days to file a writen statement for my APPEAL. My grounds for this appeal are as follows.

First, On the 18th day of February 2000, I was given a public defender by the name of Mr, Dale Sessions. On the 22nd day of February, I went back to court and met with Mr Sessions, He then told me that he hadn't received the court papers yet on my case. Mr Sessions and Mr David Doxey asked Judge Braithwaite for a continuance.

Judge Braithwaite granted the continuance to both attorneys as long as it was back in front of the judge in the ten days aloud by law. On the tenth day, the 3rd day of March, I didn't go to court, My attorney didn't come by the jail, and let me know what was going on with my case. I had my mom call the courthouse for me, and the case didn't go in front of the judge for another continuance.

Second, On the 28th day of February, I put in an inmate request to see my attorney. On The 1st Day of March, at 3:00 in the afternoon Mr Sessions came to the jail to see me, I needed to talk to him about my case. He told me at that time, that he still hasn't received any of the paperwork from the county attorneys office, or from the court-house. I then started asking him questions about the case. Mr Sessions, flatout told me that he didn't have time to take this case to trial. I also asked Mr Sessions, If he would be ready for court on the 3rd of March, Mr Sessions asked me why, I told him it was the 10th day since my arraignment. Mr Sessions answer Was. So What. I Then asked Mr Sessions about a mis-trial. He told me that we didn't want to do that. IT would make the

Court, and the county attorney mad at me, and the he, Mr Sessions, wouldn't do that in a court room. Reason #3, On the 6th day of March, It was the next time that I would see my attorney Mr Sessions. He came to the jail to tell me about the plea bargen the county attorney's office had to offer me. I didn't like the plea bargin, and I told him that. Mr Sessions, told me again that he didn't want to take it to trial. Mr Sessions then left the Iron County jail, and he went back to his office, and he called my mom. He talked to my mom and told her about the plea bargin, and Mr Sessions, had also told my mom that I would only do one year in Jail. My mom told Mr Sessions, that she would talk to me and that I would take the plea bargin. On the 8th day of March, I went back to court, Mr Sessions, then told me if I did-not take the plea bargin that Mr Doxey with the county attorneys office was going to add several new charges to the case. I said to Mr Sessions, I would say that that is called corhersion, wouldent you say. He Mr Sessions, told me never to say that word in a court room. That to me is reason #4. Reason #5, starts on the 8th day of march, I went to court and entered the plea of guilty. Between the 27th day of march, and the 31st day of March, I was able to talk my in to getting me a private attorney. From the 3rd day of April all the way up to the 10th day of April, My mom was calling Mr Sessions office, I wanted him to come and see me, and he findly came to the jail on the 10th day of April. I told him I wanted to change my plea. He told me there was no reason to change my plea, and that he wouldn't do so.

Reason #6, My mom had hired me a private attorney a Mr Bruce Oliver to defend me. On the 10th day of April my new attorney Mr Oliver put in 2 motions for the court and Judge Braithwaite to rule on. All the motions were not allowed

on the 11th day of April in court. I had to represent myself on the 11th day of April; The day of sentencing, due to Mr Oliver had to be in Richfield to take care of another case of his that he has pending.

These are the reasons for which I am asking you to base my Appeal on, and am asking for your consideration, upon these reasons.

Respectfully

Lakiba L. Dean

EXHIBIT "I"

Notice of Substitution of Counsel.

WILLARD R. BISHOP, P. C.
William H. Leigh - #5307
Attorney for Defendant
P. O. Box 279
Cedar City, UT 84721-0279
Telephone: (435) 586-9483

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WALLACE DEAN, Defendant.	**NOTICE OF SUBSTITUTION OF COUNSEL** Case No. 001500153

COMES NOW WILLIAM H. LEIGH, attorney for Wallace Dean and withdraws as Public Defender Appointee and J. BRYAN JACKSON enters his appearance as counsel for Wallace Dean in this matter.

DATED THIS ____ day of October, 2001.

J. Bryan Jackson, Esq.

William H. Leigh, Esq.

CERTIFICATE OF MAILING AND/OR HAND DELIVERY

I hereby certify that on the _____ day of October, 2001, a copy of the foregoing document was mailed and/or hand delivered to the Iron County Attorney, at 97 North Main, #1, P.O. Box 428, Cedar City, UT 84721-0428.

Secretary

EXHIBIT "J"

Transcript of Entry of Plea, March 8, 2000.

IN THE FIFTH JUDICIAL DISTRICT COURT
IRON COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

Case No. 001500153 FS

WALLACE WAYNE DEAN,

Defendant.

Preliminary Hearing
Electronically recorded on
March 8, 2000

BEFORE: THE HONORABLE ROBERT T. BRAITHWAITE
Fifth District Court Judge

APPEARANCES:

For the State:

DAVID E. DOXEY
Deputy County Attorney
97 North Main Street
Suite 1
Cedar City, Utah 84720
Telephone: (435)586-6694

For the Defendant:

DALE SESSIONS
5 North Main Street
Suite 307
Cedar City, Utah 84721
Telephone: (435)586-2878

Transcribed by: Beverly Lowe, RPR/CSR/CCT

1771 South California Avenue
Provo, Utah 84606
Telephone: (801)377-0027

PROCEEDINGS

(Electronically recorded on March 8, 2000)

THE COURT: We'll go back to the top of the calendar. State of Utah versus Wallace Dean. Are we ready on that case?

MR. DOXEY: Yes, your Honor.

THE COURT: Does this go forward?

MR. DOXEY: We need to make one quick change, your Honor.

THE COURT: All right.

MR. DOXEY: Your Honor, I think the defendant will plead guilty. The nature of the agreement, your Honor, is that Mr. Dean is going to plead guilty to Counts I, III and V. Count I is child abuse, a second-degree felony. Count III is child abuse, a Class A misdemeanor, and Count V is assault, a Class B misdemeanor.

In addition -- or in exchange for his pleas, the State will move to dismiss the remaining charges, and has agreed not to file charges of witness tampering arising from alleged threats to the children.

THE COURT: First of all, does he want to waive his right to a preliminary hearing?

MR. SESSIONS: He does.

THE COURT: He's held over for arraignment at this time. I have a statement of the defendant regarding plea bargain, specific that his Counsel has ordered, that was

initials by each of the 16 paragraphs.

MR. SESSIONS: Your Honor, while you're reviewing that I would like to explain a couple of things about this agreement.

THE COURT: I see a lot of interlineation there on the 16th. Go ahead.

MR. SESSIONS: Okay, let's see, the first change, the first time is paragraph 9. There was a word written above the word coersion. It is stricken and initialed by me and my client for the Court to disregard it.

THE COURT: Okay.

MR. SESSIONS: Likewise, on paragraph 16 there was an Information included at the bottom of the document, which has been lined through and stricken. It has my initials and my client's initials, for the Court to disregard it as well.

THE COURT: All right. So are these your initials by each of the 16 paragraphs?

MR. DEAN: Yes, sir.

THE COURT: Did you place them there after you first read each and all 16 paragraphs?

MR. DEAN: Yes, sir.

THE COURT: And are you in agreement with what your attorney just said regarding what's written here, handwriting?

MR. DEAN: Yes, sir.

THE COURT: Okay. What is your plea to Count I, child

abuse, sex abuse?

MR. DEAN: Guilty plea.

THE COURT: Count III, child abuse, a Class A second-degree misdemeanor?

MR. DEAN: Guilty plea.

THE COURT: Count V, assault, a Class B misdemeanor?

MR. DEAN: Guilty.

THE COURT: All right. The remaining counts are all dismissed. Factual basis?

MR. DOXEY: Yes, your Honor. During 1999 the State's evidence is the defendant heated up a knife, and placed it on his daughter's stomach and burned her. She still has a scar as a result of this. Then on January 7th, 2000 the defendant beat up his wife on the day before she died. She was on her death bed. That is the allegation of the assault, and then his son attempted to render aid to his mother, he grabbed his son by the throat and choked him. That is the allegation for the child abuse.

THE COURT: Okay. I assume that the wife's death was not -- we won't be looking at a murder case?

MR. DOXEY: It's not a murder case, your Honor. He beat her up. She was dying of a kidney or a liver disease.

THE COURT: Anything you want to add to or dispute that summary?

MR. SESSIONS: While my client does not agree with the

State's evidence, he understands that that is the State's evidence, and that they would be able to produce that evidence.

THE COURT: Do you engage in any alcohol or drugs, including any prescription medication from a doctor that would affect your judgment at this time?

MR. DEAN: No, sir.

THE COURT: Set this for sentencing with a pre-sentence report. We'll go with April 11th at 1:30 for the sentencing.

MR. DOXEY: Your Honor, there is a couple of other matters I'd like the Court to take into consideration on this case.

THE COURT: Oh, okay.

MR. DOXEY: Now that he's pled guilty to three counts, the remainder has been dismissed, there are a few issues. He was originally brought before the Court on a no-bail warrant. He'd like to have that removed, or recalled from the other case, and I apologize I don't have a number, but there is another case with that hold.

THE COURT: That's one that he's on supervised probation?

MR. SESSIONS: Yes. Then the other issue is in this particular case I believe bail has been set at $2,500, and with these changes, he -- and the understanding that he would help cooperate, and he has assured me that he will cooperate with the CSI in preparation, he would like to be released, be able

to make arrangements to move out of his home. He's aware of that. So he would at least ask the Court to reduce bail to a $5,000 bond, so that he can secure a bond and be released between now and April 11th to make those arrangements.

THE COURT: State's position?

MR. DOXEY: Your Honor, the State opposes the motion to reduce the bail and to lift the no-bail hold on him.

For the record, your Honor, in his previous cases, case No. 961500370, a no-bail warrant -- a no-bail order, rather, was placed on him for numerous reasons. First, that he has continued to violate his probation and disregard many of the conditions of his probation.

Secondly, your Honor, the crimes which he has just pled guilty to are extremely violent. He has perpetrated against his two children and his deceased wife. Since the investigation has begun, Mr. Dean has threatened to kill his children if they testify against him.

We believe, your Honor, there's a substantial risk of Mr. Dean hurting his children. Right now they have to have protective custody, but we believe there's a substantial risk of -- we are in possession, your Honor, of a journal from his wife that outline the defendant's actions throughout the year.

THE COURT: I don't deny the fact that he's been on, then, for no other reason he's on probation with the Court already, supervised, and his many serious offenses which he's

just pled guilty, I can't imagine that he wouldn't receive at least as many days in jail as are between now and sentencing. The statute allows me to after a conviction, which has just occurred, to commit a person to jail pending sentencing, so that's what I'm doing.

MR. DOXEY: Thank you, your Honor.

(Hearing concluded.)

EXHIBIT "K"

Order on Motion Withdraw Guilty Plea.

FILED

APR 11 2000

5th DISTRICT COURT
IRON COUNTY
DEPUTY CLERK

DAVID E. DOXEY (7506)
Deputy Iron County Attorney
97 North Main, Suite #1
P.O. Box 42
Cedar City, Utah 84720
Telephone: (435) 586-6694
Facsimile: (435) 586-2737

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WALLACE DEAN Defendant	ORDER ON MOTION TO WITHDRAW GUILTY PLEA CASE NO. 001500153 JUDGE ROBERT T. BRAITHWAITE

THE COURT having considered the MOTION TO WITHDRAW GUILTY PLEA, hereby denies said motion on the grounds set forth in the State's response.

DATED this 11 day of April, 2000

BY THE COURT

STATE OF UTAH FIFTH DISTRICT COURT IRON COUNTY

JUDGE ROBERT T. BRAITHWAITE

00053

Exhibit L

State v. Dean

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,
Plaintiff and Appellee,

v.

Wallace Dean,
Defendant and Appellant.

OPINION

(For Official Publication)

Case No. 20000340-CA

FILED

October 3, 2002

2002 UT App 323

---

ct, Cedar City Department
rable Robert T. Braithwaite

ackson, Cedar City, for Appellant
ıurtleff and Jeanne B. Inouye, Salt Lake City, for Appellee

---

lges Jackson, Bench, and Greenwood.

, Presiding Judge:

BACKGROUND

ch 8, 2000, Dean pleaded guilty to one count of child abuse, a second degree felony, one count of child abuse, a class A misdemeanor, and assault, a sdemeanor. In connection with his plea, he executed a statement that detailed the constitutional rights he was waiving. Dean initialed each paragraph of ent. Before accepting his guilty pleas, the trial court asked Dean if he had read the statement that he had executed and initialed each of the paragraphs. vered affirmatively, and proceeded to plead guilty to the above-listed charges. Dean was not advised, either in his signed statement or by the trial court, s waiving not only his right to a jury trial, but also his right to a speedy trial before an impartial jury.

l 10, 2000, Dean filed a motion to withdraw his guilty plea. He argued that the trial court failed to strictly comply with rule 11 of the Utah Rules of Criminal in two ways. He first argued, incorrectly, that he had not been advised of the time limit for filing a motion to withdraw his guilty plea. However, the court did of the thirty-day deadline. He did not specify the basis for the second violation. On April 11, 2000, Dean was convicted and sentenced after the trial court motion to withdraw his guilty plea. He appeals that denial and his conviction.

ISSUE AND STANDARD OF REVIEW

gues for the first time on appeal that the trial court committed plain error because he was never advised of his right to a speedy trial by an impartial jury, l to a mere trial by a jury. Dean filed a motion to withdraw his guilty plea, but on appeal challenges the denial of that motion "for the first time on appeal [on ıat the trial court failed to inform him of his right[s] to a speedy trial" and an impartial jury. State v. Hittle, 2002 UT App 134,¶5, 47 P.3d 101. Thus, he [that the trial court committed] plain error. To succeed on a claim of plain error, a defendant has the burden of showing (i) [a]n error exists; (ii) the error e been obvious to the trial court; and (iii) the error is harmful." Id. (quotations and citations omitted).

ANALYSIS

I. Jurisdiction

reaching the issue Dean raises, we address the State's argument that we lack jurisdiction to review Dean's plain error argument. In order to effectively ıe State's jurisdictional challenge, we first sketch Utah's previous decisions relating to challenges to guilty pleas.

e v. Gibbons, the supreme court held that "Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements ied with when a guilty plea is entered." 740 P.2d 1309, 1312 (Utah 1987).[1] However,

]n Gibbons, the Supreme Court determined that a defendant could not simply appeal a conviction based on a guilty plea. Rather, defendant must rst file a motion to withdraw [his] plea, giving the court who took the plea the first chance to consider defendant's arguments. If the motion is enied, defendant could then appeal--not from the conviction per se, but from the denial of the motion.

v. Cook, 759 P.2d 341, 342-43 (Utah Ct. App. 1988). If a defendant fails to file a motion to withdraw his guilty plea, he may only attack his guilty plea /. See id.

ı guilty plea has been entered, a defendant has thirty days from "the entry of final judgment of conviction at the district court" to file a motion to withdraw his State v. Ostler, 2001 UT 68,¶11 & n.3, 31 P.3d 528 (Ostler II). We have previously held that the time limit on withdrawing a guilty plea is jurisdictional. See rice, 837 P.2d 578, 582-84 (Utah Ct. App. 1992). "Accordingly, if a defendant is advised of the deadline when the plea is entered, the trial court lacks ı to consider a motion to withdraw filed after the thirty-day period." State v. Canfield, 917 P.2d 561 (Utah Ct. App. 1996). Nevertheless, "in State v. Ostler, \pp 28, 996 P.2d 1065 (Ostler I), this court recognized a narrow exception to the jurisdictional rule in Price. We concluded that although district courts lack ı under Price to consider the merits of untimely motions to withdraw guilty pleas, we may review alleged violations of Rule 11 of the Utah Rules of Criminal ı . . . for plain error." State v. Melo, 2001 UT App 392,¶4, 40 P.3d 646; accord State v. Tarnawiecki, 2000 UT App 186,¶11, 5 P.3d 1222.

preme court recently eliminated this exception to the jurisdictional rule, stating that because the appellant failed to file a motion to withdraw his guilty plea, acked jurisdiction to address his challenge to the plea, even for plain error. See State v. Reyes, 2002 UT 13,¶¶3-4, 40 P.3d 630 ("This court may choose to issue not properly preserved for plain error. It cannot, however, use plain error to reach an issue over which it has no jurisdiction." (Internal citation Thus, the supreme court declined to hear Reyes's plain error argument, which directly attacked his guilty plea. See id.

Reyes, the State asserts that because Dean's motion to withdraw his plea "did not claim the errors now alleged on appeal," his motion was somehow t to allow appellate jurisdiction. Thus, the State argues that Dean's appeal amounts to nothing more than a direct attack on his guilty plea rather than a to the denial of his motion to withdraw.

er, in Reyes, the supreme court did not address the sufficiency of a motion to withdraw a guilty plea. Rather, it stated that the defendant must file his hin the thirty-day deadline. See id. Unlike the defendant in Reyes, Dean filed a timely motion to withdraw his guilty plea. Thus, although Dean failed to ı basis for his motion to withdraw, the supreme court's ruling in Reyes does not preclude this court from reviewing his plain error argument. Accordingly, we challenge under the plain error standard.

II. Plain Error

argues for the first time on appeal that the trial court committed plain error because he was never advised of his right to a speedy trial by an impartial jury, d to a mere trial by a jury. As we concluded in Hittle, which discussed identical issues, "[t]he trial court did not strictly comply with rule 11 because it failed)efendant of his right[s] to a speedy [public] trial [and an impartial jury] either orally or in the plea affidavit. Therefore, the trial court erred."[2] Hittle, 2002 UT t ¶6 (concluding the trial court erred after analyzing Tarnawiecki).

tate argues that State v. Martinez, 2001 UT 12, 26 P.3d 203 "is inconsistent with the decision[s] in Tarnawiecki [and Hittle] and, by implication, overrules" ntends that "nothing [in Martinez] . . . suggested that the trial court had used the terms impartial and speedy, [yet] the [supreme court] nonetheless held lloquy 'strictly complied' with rule 11." However, nothing in Martinez suggests that the trial court had not used these terms in the plea colloquy. Moreover, e rights these terms convey were communicated to the defendant in Martinez was not an issue before the court in that case. See id. Thus, we cannot say ez overrules Tarnawiecki and Hittle.

'in light of [State v. Visser, 1999 UT App 19, 973 P.2d 998 (Visser I), rev'd on other grounds by Visser II, 2000 UT 88, 22 P.3d 1242[3]] and Rule 11, the d have been obvious to the trial court." Tarnawiecki, 2000 UT App 186 at ¶18.

ıally, the trial court's omission was harmful because the omission dealt with a substantial constitutional right. It is well established under Utah law at we will presume harm under plain error analysis when a trial court fails to inform a defendant of his constitutional rights under rule 11. See, e.g., ırnawiecki, 2000 UT App 186 at ¶18 (presuming harm when trial court failed to inform Defendant that she was entitled to a "speedy trial before an partial jury"); State v. Ostler, 2000 UT App 28,¶¶25-26, 996 P.2d 1065 (presuming harm where trial court failed to inform defendant that he would ıive certain constitutional rights by pleading guilty) . . . .

2 UT App 134 at ¶9 (first citation omitted). Accordingly, the trial court committed plain error by failing to advise Dean of his right to a speedy trial before an ry.[4]

CONCLUSION

use the trial court committed plain error in advising [Dean] of his rights, we reverse [the denial of Dean's motion to withdraw his plea, vacate his conviction] id for proceedings consistent with this opinion." Id. at ¶11.

. Jackson,
Judge

ICUR:

Greenwood, Judge

ons, this court adopted a 'strict compliance' test which superseded the 'record as a whole' test traditionally applied on review in cases dealing with knowing ary guilty pleas." State v. Maguire, 830 P.2d 216, 217 (Utah 1991).

te correctly notes that "[s]trict compliance . . . does not mandate a particular script or rote recitation of the rights listed." State v. Visser, 2000 UT 88,¶11, 42 (Visser II). However, "'the trial court [must] . . . establish on the record that the defendant knowingly waived his or her constitutional rights,'" id. (citation o a "'speedy public trial before an impartial jury.'" Id. at ¶10 (quoting Utah R. Crim. P. 11(e)). This is a greater right than a mere right to a jury trial. Thus, ne terms "impartial" and "speedy" may be communicated by various means to the defendant, they may not be considered merely inconsequential modifiers trial right. Here, nothing in the record suggests the trial court established that Dean knowingly waived anything more than a right to a potentially partial and ry trial.

sent argues that "Tarnawiecki's reliance upon [Visser I] is . . . suspect given that Visser I was reversed by the Utah Supreme Court in [Visser II]." However, as decided on November 14, 2000, after both Tarnawiecki, which was decided on June 15, 2000, and the trial court's denial of Dean's motion to withdraw lea on April 11, 2000. Thus, the trial court in this case was still constrained by Visser I as of the date of its denial of Dean's motion to withdraw.

the supreme court reversed Visser I not because a defendant is not entitled to be informed of his right to a speedy trial before an impartial jury, but ne record in that case reflected that Visser had been informed of his rights. In Visser II, the supreme court held

at the trial court's colloquy, in light of the mid-trial context of the plea, provided an adequate basis in the record to conclude that the trial court ictly complied with rule 11. . . . [T]he record details Visser's personal trial experience up to the point of his plea agreement. We conclude that this perience communicated at least as much as would the mere oral recitation of the "right to a speedy public trial before an impartial jury."

000 UT 88,¶13, 22 P.3d 1242 (emphasis added).

ent case, Dean's plea was not taken in a mid-trial context. Because the trial court's colloquy was given in a mid-trial context and there was no indication il had been delayed, the supreme court in Visser II assumed that Visser had already received the benefit of his speedy trial right. See id. at ¶14. Similarly, ne court held that Visser's participation in his own jury selection process was instrumental in ensuring that his plea was voluntary. See id. at ¶16. In the se, Dean's trial had not yet begun, and the jury had not yet been selected. Thus, we cannot say that the record in this case reflects "at least as much as nere oral recitation of the 'right to a speedy public trial before an impartial jury.'" Id. at ¶13.

f this decision, we decline to address Dean's remaining arguments.

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idge (dissenting):

ctfully dissent. I cannot say that the trial court "plainly erred" in not advising Defendant of his right to a "speedy" trial by an "impartial" jury.

ablish plain error a defendant must show that "'(1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error was harmful . . Ross, 951 P.2d 236, 238 (Utah Ct. App. 1997) (citation omitted) (emphasis added). "Utah courts have repeatedly held that a trial court's error is not plain e is no settled appellate law to guide the trial court." Id. at 239; see also State v. Braun, 787 P.2d 1336, 1341-42 (Utah Ct. App. 1990) (rejecting a claim of where "'the trial court did not have the benefit of [a later] appellate decision'" (citation omitted) (alteration in original)). I disagree with the majority's that the trial court's error in not advising Defendant of his rights should have been obvious to the trial court in light of State v. Hittle, 2002 UT App 134, 47 nd State v. Tarnawiecki, 2000 UT App 186, 5 P.3d 1222. Both of these cases were decided after Defendant in this case had entered his plea. Therefore, I ow these decisions could have been obvious to the trial court. Tarnawiecki's reliance upon State v. Visser, 1999 UT App 19, 973 P.2d 998, (Visser I), is t given that Visser I was reversed by the Utah Supreme Court in State v. Visser, 2000 UT 88, 22 P.3d 1242 (Visser II).

v in this area remains unclear and unsettled. There is some question as to whether we even have jurisdiction to address Defendant's rule 11 arguments.

tah R. Crim. P. 11. Defendant entered his plea on March 8, 2000 and moved to withdraw it 33 days later, on April 10, 2000. After denying his motion, the trial entenced Defendant on April 11, 2000. State v. Ostler, 2001 UT 68,¶11, 31 P.3d 528, held that "the thirty-day limitation on filing a motion to withdraw a plea of or no contest runs from the date of final disposition of the case" and not from the date of the plea colloquy. However, in a later case, State v. Reyes, 2002 UT 40 P.3d 630, the Utah Supreme Court concluded that it lacked jurisdiction to entertain the defendant's rule 11 arguments because the defendant "did not o withdraw his guilty plea within thirty days after the entry of the plea." (Emphasis added.) Although Reyes cites Ostler, I cannot say that Reyes overruled See State v. Menzies, 889 P.2d 393, 398-99 (Utah 1994) (discussing the standard for overruling precedent).

rthermore, there is some question as to whether a trial court must use the terms "speedy" trial and "impartial" jury, in order to strictly comply with the ments of rule 11. In State v. Martinez, 2001 UT 12,¶22, 26 P.3d 203 and Visser II, our supreme court seems to intend to overrule Tarnawiecki and its y, but this was never done expressly. I therefore cannot say that Tarnawiecki and Hittle have been overruled. SeeMenzies, 889 P.2d at 398-99.

Martinez, the Utah Supreme Court concluded that the district court strictly complied with rule 11 by informing the defendant about "the right to a jury trial." T 12 at ¶¶22-25. No use of the words "speedy" trial or "impartial" jury were needed to meet the requirements of rule 11. In Visser II, the supreme court stated]trict compliance, . . . does not mandate a particular script or rote recitation of the rights listed" and "[s]trict compliance does not require a specific method of nicating the rights enumerated by rule 11." Visser II, 2000 UT 88 at ¶¶11,13. The court then proceeded to conclude that the trial court strictly complied with although it did not specifically inform the defendant of his "'right to a speedy public trial before an impartial jury.'" Id. at ¶13.

contrast, Tarnawiecki concluded that the trial court plainly erred when it failed to specifically inform the defendant of her right to a speedy trial before an l jury. See Tarnawiecki, 2000 UT App 186 at ¶¶16-20. Tarnawiecki relied upon the court of appeals decision in Visser I, which the supreme court later d in Visser II. Hittle then relies upon Tarnawiecki, in concluding that "the trial court . . . [plainly erred by failing] to advise [d]efendant of his substantial tional right to a speedy trial." Hittle, 2002 UT App 134 at ¶10.

cause the cases in this area are so inconsistent, the supreme court should reevaluate the caselaw and set up some base-line rules that are clear and easy to n so doing, it should expressly overrule inconsistent cases.(1)

ed on the foregoing, I cannot say that the trial court plainly erred. I would therefore affirm.

W. Bench, Judge

oversies such as the one before us should be relatively easy to avoid as a practical matter. The problem we now face could have been avoided if the plea ent had exactly tracked the rights mentioned in rule 11. In the modern era of word processing and computers, it would not be difficult to modify existing forms are new ones) that precisely track a defendant's rule 11 rights.